the opportunity of being heard before the decision was made to terminate his appointment, then it would not have mattered one farthing whether the applicant was or was not on probation when his appointment was terminated. The respondents, however, had elected to treat the applicant as a probationary officer. In that view they were wrong. I accordingly hold that the applicant should be granted *ex debito justitiae* the order that he seeks, and costs.

Order granted.

THE SOUTH BRITISH INSURANCE CO. LTD. v. HAJI ISMAIL; SIN KEK YEOW, INTERVENER

[O.C.J. (Hepworth J.) December 3, 1963]
[Penang — C.S. No. 123 of 1960]

Practice and Procedure—Judgment by default—3rd party intervening to set aside judgment—Principles applicable—R.S.C. 1957, O.27 r.15—Whether motion proper procedure.

Insurance—Road Traffic Ordinance, 1958, ss. 75 and 80—3rd party risks—Non-disclosure of material facts—Avoidance of policy.

By a proposal form and declaration dated November 11, 1958, the defendant requested the plaintiffs to issue him a policy of insurance in respect of liability to third party risks in respect of motor car AA. 7919. The defendant in answer to questions in the proposal form stated that he was the owner of the vehicle and that it was registered in his name. The plaintiff thereupon issued him a policy covering the period November 11, 1958 to November 10, 1959.

On September 25, 1959 the motor car was involved in an accident in which one of the passengers, WPS, was killed and various others injured. On June 29, 1960 the plaintiffs took out this suit to obtain a declaration that the policy was void for non-disclosure of material facts and for an absence of insurable interest. Judgment was obtained by the plaintiffs in default of the defendant's appearance. In the affidavit filed by the plaintiffs in support of the motion for judgment, it was stated that the motor car concerned was sold by the defendant to one WF on December 4, 1958.

Subsequent to the issue of this writ but prior to judgment, the applicant as administratrix of WPS, deceased, brought an action against the defendant and two others for damages arising out of the accident. The suit was heard on September 25, 1963 and the applicant obtained judgment against the defendant for $31,000 and costs. The plaintiff company refused to pay. The applicant applied under Order 27 r.15 for liberty to intervene and to set aside the judgment by default.

Held: (1) Order 27 r. 15 gives a completely unfettered discretion to the Court to set aside a judgment by default. No time limits of any kind are prescribed;

(2) persons although not parties to an action if they are the persons aggrieved by the judgment in that action are entitled to an order setting aside that judgment and giving them leave to enter an appearance in the action in the name of the defendant or in their own name and to deliver a defence;

(3) on the merits of the case, the defendant had not obtained the policy by non-disclosure of material facts as what was stated was true at the time the policy was obtained and accordingly, the judgment dated June 23, 1961 must be set aside.

Cases referred to:—

(1) *Leong Han* v. *Kupusamy* [1959] M.L.J. 95.

(2) *Windsor* v. *Chalcraft* [1939] 1 K.B. 279.

(3) *Evans* v. *Bartlam* [1937] A.C. 473.

APPLICATION UNDER O. 27 r. 15.

N. Sharma for the Intervener-applicant.

Chin Yew Choe for the plaintiffs.

Defendant in person, absent.

Cur. Adv. Vult.

Hepworth J.: This is an application under Order 27 rule 15 for liberty to intervene in this suit and set aside the judgment by default contained in an order of court dated the 23rd June, 1961. The plaintiffs in that suit are the South British Insurance Co. Ltd (hereinafter referred to as the company) and the defendant is one Haji Ismail bin Haji Jaffar (hereinafter referred to as Haji Ismail).

The facts of the case are as follows. By a proposal form and declaration dated the 11th November, 1958, Haji Ismail requested the company to issue to him a policy of insurance in respect of, *inter alia*, liability to third party risks in respect of Vauxhall Wyvern saloon motor-car bearing registration number AA. 7919. The said proposal form and declaration contained questions as to whether Haji Ismail was the owner of the vehicle proposed for insurance and whether it was registered in his name and his answer to both questions was in the affirmative. In reliance upon the proposal form and declaration and the truth of the representations contained therein the company issued to Haji Ismail a policy of insurance and agreed thereby for the period of one year from the 11th November, 1958, until the 10th November, 1959, that it would indemnify him against liability to third parties. It was an express provision of the said policy that the said proposal form and declaration should be the basis of the said policy and should be duly incorporated therein. In pursuance of the said policy and in accordance with the provisions of the law the company issued a certificate of insurance. As the company stated in their statement of claim that the period covered by the policy was from the 11th November, 1958, until the 10th November, 1959, it is reasonable to assume that a certificate of insurance was delivered by the company to Haji Ismail on or about the 11th November, 1958.

The motor-car No. AA. 7919 was involved in an accident on the 25th September, 1959. On this date Haji Ismail was the registered owner of the vehicle and also the holder of a public service vehicle licence in respect thereof. On that date the policy issued by the company to Haji Ismail was still in force.

As a result of the accident the motor-car

No. AA. 7919 was a total loss and in due course a total loss claim amounting to $1,200 was made by Haji Ismail against the company, and the company settled the claim by payment of the sum of $1,000. In addition to the damage to the said vehicle one of the passengers in the vehicle, one Wong Pak Siew, was killed and the applicant is his widow and the administratrix of his estate.

In the affidavit sworn on behalf of the company in support of the motion for judgment in this suit it is alleged that about a month after making the payment to Haji Ismail the company came to hear that Haji Ismail was not in fact the owner of the motor-car No. AA. 7919 at the time of the accident.

The company therefore commenced proceedings by issuing the writ in this suit on the 29th June, 1960, claiming a declaration that they were entitled to avoid the policy of insurance. The material parts of the statement of claim read as follows:—

"7. The plaintiff avers that the said representation of fact contained in the said answer was false in the following material particular in or about the said making of the policy, namely that in truth and in fact the defendant was not and never had been the owner of the said vehicle. The vehicle had been bought by one Wong Fun who had caused the said vehicle to be registered in the name of the defendant.

8. In the alternative the plaintiff avers that the defendant by his said answer to the said question failed to disclose facts material to be known to the plaintiff on or about the making of the said policy.

9. In the further alternative the plaintiff avers that the defendant not being the owner and having no title in or to the said vehicle had no insurable interest therein and accordingly the said policy and certificate were void and of no effect.

10. By reason of the provisions of the Road Traffic Ordinance the plaintiff claims that apart from any provision contained in the said policy it is and at all material times was entitled to avoid the same on the ground that the said policy was obtained by the defendant by the non-disclosure and/or misrepresentation of material facts referred to in paragraphs 7 and 8 herein.

11. Further and in the alternative the plaintiff claims that the said policy and certificate were *ab initio* void and of no effect by reason of the fact that the defendant has not and has never at any time had any insurable interest in the said vehicle.

And the plaintiff claims

(1) A declaration that it is and at all material times has been entitled to avoid the said policy of insurance and certificate thereof apart from any provision contained therein on the ground that the said policy and certificate were obtained by the non-disclosure of material facts which were false in some material particulars.

(2) Alternatively, a declaration that the said policy of insurance and certificate thereof were void and of no effect by reason that the defendant had not and never had at any material time any insurable interest in the said vehicle."

Haji Ismail did not enter an appearance and upon a motion for judgment an order making the declaration asked for was made on the 23rd June, 1961. It is this order which the applicant seeks to set aside.

The applicant as the administratrix of the estate of Wong Pak Siew, deceased, brought a civil action in the High Court at Ipoh, being Ipoh High Court Civil Suit No. 72 of 1961, in which Haji Ismail and 2 others were the defendants for damages arising out of the negligence of the driver of motor-car No. AA. 7919 on the 25th September, 1959. The said suit was heard on the 7th August, 1963, and the applicant obtained judgment for $31,000 damages and costs against Haji Ismail. After obtaining judgment the applicant's solicitor wrote to the company on the 6th September, 1963, for payment, but the company have refused to pay.

The writ in this suit was issued prior to the issue of the writ in Ipoh High Court Civil Suit No. 72 of 1961. It is clear, however, although the date of issue of the writ in the Ipoh suit was not stated, that it was issued prior to the company obtaining judgment in this suit on the 23rd June, 1961, and that also prior to that date the company had notice of the Ipoh suit. In my opinion the company must have been aware, as three other persons were either killed or injured in the accident in addition to the husband of the applicant, that action was likely to be taken by such persons, and must have been aware of this prior to the commencement of this suit, and must have taken action in this suit specifically for the purpose of avoiding liability to those persons. There would have been no point in their commencing this suit had that not been the case. That is not to say however that they were not entitled to take the action which they did. Separate actions were in fact commenced by all the persons involved against Haji Ismail and two other persons, and the company or their solicitors were given notice of these actions in April or May, 1961. What the applicant is complaining about is that she was at no time informed of the proceedings in this suit until after the order of the 23rd June, 1961, had been obtained and was given no opportunity of being heard. It appears from the correspondence that Mr. Sharma who was acting for the applicant in her action against Haji Ismail was not made aware of that order until the 30th August, 1961. Thereupon he immediately wrote to Messrs. Presgrave & Matthews, the solicitors for the company, informing them that the applicant not being a party to this suit did not consider herself bound by the order and that if judgment was obtained in the Ipoh suit she would hold the company liable to satisfy the judgment.

The case of *Leong Han* v. *Kupusamy* [1] is authority for saying that Order 27 rule 15 gives a completely unfettered discretion to a court to set aside a judgment by default. No time limits of any kind are prescribed. The case of *Windsor* v. *Chalcraft* [2] is authority for saying that persons although not parties to an action if

they are persons aggrieved by the judgment in that action are entitled to an order setting aside that judgment and giving them leave to enter an appearance in the action in the name of the defendant or in their own name and to deliver a defence. On these two authorities it seems to me that in the circumstances of this case there is abundant power to make the order which has been asked for.

There is, however, one other question which has to be considered before a decision can be made whether this is an appropriate case for the exercise of the discretion given by Order 27 rule 15, and that is what are the merits of the applicant's case? Referring to the exercise of the court's discretion under Order 27 rule 15 Lord Atkin said in *Evans* v. *Bartlam* [3] that the courts have laid down for themselves rules to guide them in the normal exercise of their discretion and one is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence. In *Leong Han's case* the applicant was the defendant and in his judgment the learned Judge stated that he considered that the defendant had disclosed a *prima facie* defence. In *Windsor* v. *Chalcraft*, where the applicant was not the defendant and was not a party to the action but was a person aggrieved by the judgment in that action, evidence was given by affidavit to the effect that there was a good defence to the action on the merits. It is therefore necessary to consider whether the applicant has a good defence to the action on the merits.

In the affidavit sworn on behalf of the company in support of the motion for judgment in this suit paragraphs 4, 5 and 6 read as follows:—

"4. About a month after making the aforesaid payment I came to hear that the defendant herein was not in fact the owner of the said vehicle at the time of the accident.

5. I made inquiries and subsequently obtained two documents evidencing sales of the said vehicle (a) from the defendant to one Wong Fun and (b) from Wong Fun to one Foo Min Chuen. The agreement dated 4th December, 1958, and made between the defendant and the said Wong Fun is now produced and shown to me marked 'SFD1'. The agreement (in Chinese) dated 23rd April, 1959, and made between the said Wong Fun and the said Foo Min Chuen together with a certified translation thereof annexed are now produced and shown to me marked 'SFD2'.

6. I subsequently made inquiries from Netherlands Trading Society on whom a cheque for $1,000 (being part payment towards the total loss claim) had been drawn in favour of the defendant, and as a result of these inquiries I ascertained that the said cheque had been paid into the account of Chop Kwong Nam Sang with the Kampar Branch of Oversea-Chinese Banking Corporation Limited, a copy of the said cheque is now produced and shown to me marked 'SFD3'."

The date "the 4th December, 1958" in paragraph 5 should read "the 14th December, 1958". Both the agreements were duly stamped and if they are to be taken at their face value they clearly show that from the 14th December, 1958, until the 23rd April, 1959, motor-car No. AA. 7919 was the property of the said Wong Fun and that from the 23rd April, 1959, it was the property of the said Foo Min Chuen. It is also a reasonable inference, if on the 14th December, 1958, Haji Ismail sold motor-car No. AA. 7919 to Wong Fun as is alleged in the affidavit, that prior to that date he was the owner. It was these facts which the company alleged supported their motion for judgment. In my opinion they do not do any such thing.

The Writ and the statement of claim pleaded that the policy of insurance was void on the ground that it had been obtained by the non-disclosure of material facts and/or by the representation of facts which were false in some material particular and alternatively that it was void and of no effect by reason that Haji Ismail had not and never had had at any material time any insurable interest in motor-car No. AA. 7919. In other words that the non-disclosure and the representation of false facts were things which had happened on or before the 11th November, 1958, which was the date on which the proposal form and declaration had been made and on or about which the certificate of insurance must have been delivered by the company to Haji Ismail.

The affidavit in support of the motion for judgment deals with matters which only arose on or after the 14th December, 1958. As I have already said the 14th December, 1958, is the date which is stated in the affidavit made on behalf of the company to be that upon which motor-car No. AA. 7919 was sold by Haji Ismail to one Wong Fun. If that were the case then there is nothing to show that at the time the proposal form and declaration was completed by Haji Ismail on the 11th November, 1958, the contents of it was not true. In other words the evidence upon which the company appears to be relying in support of the matters pleaded in the writ and statement of claim does not in fact support their claim.

Section 80(1) of the Road Traffic Ordinance, 1958, reads as follows:—

"80. (1) If, after a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against the insured person, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

The applicant has obtained judgment in respect of a liability required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of the Ordinance against the insured person, Haji Ismail, and it seems probable that a certificate of insurance has been delivered under sub-section (4) of section 75 of the Ordinance by the company to Haji Ismail.

In so far as Haji Ismail did not enter appearance and in consequence the company were entitled to judgment in default as prayed the judgment was obtained regularly. But it seems to me that in all the circumstances of this case the applicant has established that she has a *prima facie* defence to the company's claim in this suit.

The point was taken on behalf of the company that the procedure by way of motion was wrong and that the proper procedure was by way of summons-in-chambers. I think that this is probably correct but, as Mr. Sharma pointed out, even if it had been by way of summons-in-chambers it would have been necessary to adjourn the summons-in-chambers into open court for argument. I do not think that any injustice has resulted and I think that this point is covered by Order 70.

There will accordingly be an order in terms of the motion.

Order in terms.

Solicitors: *N. Sharma*; *Presgrave & Matthews.*

KHOO HEAN KEE v. CHOP WONG SOON CO.

[F.C. (Thomson L.P., Barakbah C.J. & Tan Ah Tah J.) December 3, 1963]

[Ipoh — Federal Court Civil Appeal No. 16 of 1963]

Practice and Procedure—Appeal from Rent Assessment Board to High Court—Whether High Court can extend time limited for appeal—Control of Rent Ordinance, 1956, s.11(2) and (3).

The High Court cannot extend the period limited for appeals from the Rent Assessment Board to the High Court under secton 11(2) of the Control of Rent Ordinance. Section 11(3) of that Ordinance can have no application until there are some proceedings of some sort in the High Court and the only way in which such proceedings can be commenced within the ambit of the statute is to bring an appeal within fourteen days.

Case referred to:—

(1) *Lee Lee Cheng* v. *Seow Peng Kwang* [1960] M.L.J. 1, C.A.

FEDERAL COURT.

F. C. Arulanandom for the appellant.

N. Sharma for the respondent.

Thomson, Lord President (delivering oral judgment): This is an appeal against an order made by Mr. Justice Neal on 25th June, 1963, whereby His Lordship extended the time within which an appeal against a decision of the Rent Board for Ipoh may be brought.

The Control of Rent Ordinance, 1956, which for the purposes of this appeal I am content to assume is in force in the State of Perak although I have no certain knowledge on the point, set up bodies for certain specified areas which it called Rent Assessment Boards. They were statutory bodies exercising powers given to them by the Ordinance and these are powers which, I think it is correct to say, are powers which cannot be exercised by any of the Courts of Judicature established under the provisions of the Constitution.

The Ordinance in certain circumstances gives a right of appeal against decisions of these Boards and that right of appeal is dealt with by section 11 which reads as follows:—

"(1) An appeal shall lie on a point of law from any decision of the Board.

(2) Such an appeal may be brought by any party aggrieved by the decision of the Board and shall be brought before the High Court by means of a notice of appeal lodged within fourteen days after the date on which the decision was made.

(3) The procedure governing such appeals to the High Court shall be the same as for appeals to the High Court from decisions of Sessions Courts in civil matters."

Clearly sub-section (1) confers a certain right of appeal *tentum et tale* and it is my view that sub-section (2) lays down a condition which must be fulfilled before such an appeal may be brought. That condition is that it shall be brought within fourteen days of the date on which the decision appealed against was made.

The only question in the present proceedings is whether the High Court can (I use the word "can" advisedly) extend that period.

In the present case Mr. Justice Neal was of the opinion that the High Court could extend the time and acting on that opinion he granted an extension of time.

With great respect to the argument to which we have listened this morning it is clear that the main reason Mr. Justice Neal decided the matter as he did was that he took the view that the case of *Lee Lee Cheng* v. *Seow Peng Kwang* [1] was wrongly decided by this Court.

Speaking for myself, apart from any question of *stare decisis*, apart from any question of judicial hierarchy, apart from any question of a decision of the Court of Appeal being binding on the High Court, I see no reason whatsoever to depart from the views I expressed in that case and I do not propose to add to or to exegesize these views here.

I think, however, out of regard to the argument we have listened to on behalf of the respondent (and I may say listened to with pleasure) I should deal with the point that sub-section (3) has some bearing on the matter. That subsection provides that the procedure governing